ETIQA TAKAFUL BHD v. CHONG MENG KOOI & ANOR

HIGH COURT MALAYA, SHAH ALAM
WONG KIAN KHEONG J
[CIVIL APPEAL NO: BA-11ANCVC-52-11-2018]
24 JUNE 2020

INSURANCE: *Liability – Co-insurer – Claim for indemnity – Whether insurance policy issued by co-insurer to insured party within meaning of ss. 91(1)(a), (b) and 96(1) of Road Transport Act 1987 ('RTA') – Whether certificate of insurance delivered by co-insurer to insured party – Whether there was novation of insurance policy – Whether policy had lapsed – Whether insured party could claim against co-insurer for indemnity for half of judgment sum obtained – Whether conditions under s. 96 of RTA fulfilled*

One Nafizal Ahmad ('Nafizal') had filed an action at the Magistrate's Court against the first respondent ('first plaintiff') based on the allegation that, on 12 February 2016, an accident occurred between the motorcycle ridden by Nafizal and the car driven by the first plaintiff ('Klang suit'). Nafizal and the first plaintiff entered into a consent judgment which provided: (i) without any admission as to liability, the first plaintiff shall pay RM55,000 to Nafizal which comprised general and special damages, interests and costs ('judgment sum'); (ii) the consent judgment was recorded without any prejudice to the right of the first plaintiff's insurer of the car, the second respondent ('the second plaintiff') to claim an indemnity from the co-insurer of the car, the appellant ('defendant'). The plaintiffs filed a suit at the Magistrate's Court against the defendant on the grounds that (i) the second plaintiff was an insurer of the first plaintiff's car who had paid the judgment sum to Nafizal. Accordingly, the first plaintiff's rights under the insurance policy with the second plaintiff had been subrogated to the second plaintiff; and (ii) the defendant was the co-insurer of the car against whom the second plaintiff could claim an indemnity for half of the judgment sum, namely an amount of RM27,500. The plaintiffs conducted a search of the records of Jabatan Pengangkutan Jalan ('JPJ') and JPJ's 'Maklumat Insurans Kenderaan' stated that the defendant was the insurer of the car from 3 March 2015 to 2 March 2016 ('JPJ's record'). As such, due to the subrogation, the plaintiffs could claim in this action for the defendant to pay the sum to the second plaintiff. The defendant applied to strike out the plaintiffs' suit following the arguments that (i) the defendant had insured the car for the benefit of one Thulasimani for a period of time from 3 March 2015 until 2 March 2016; and (ii) Thulasimani sold the car in June 2015, before the accident, and hence, the defendant was not the co-insurer at the time of the accident. Hence, the present appeal. The issues that arose for consideration were: (i) the weight to be attached to JPJ's record of the car insurance under s. 117 of the Road Transport Act 1987 ('RTA'); and (ii) whether the defendant was

liable as a co-insurer of the car to the plaintiffs, under ss. 91(1), (4) and 96(1) of the RTA when: (a) there was no insurance policy issued by the defendant to the first plaintiff regarding the car within the meaning of ss. 91(1)(a), (b) and 96(1) of the RTA; (b) a certificate of insurance in the prescribed form had not been delivered by the defendant to the first plaintiff as required by ss. 91(4) read with s. 96(1) of the RTA; (c) contrary to s. 96(2)(a) of the RTA, the first plaintiff did not give notice of the Klang suit to the defendant before or within seven days after the commencement of the Klang suit; (d) there was no novation of the defendant's policy for Thulasimani under s. 63 of the Contracts Act 1950 ('CA') because the defendant had not agreed to indemnify the first plaintiff regarding the car; and (e) as there was no novation of the defendant's policy for Thulasimani for the defendant to indemnify the first plaintiff concerning the car, the defendant's policy for Thulasimani had lapsed upon Thulasimani's sale of the car.

Held (allowing appeal):

(1) As explained in *Pacific Insurance Bhd v. Tharmaseelan Multi Trans* ('*Pacific Insurance*'), an insurer is only liable for a judgment obtained by a victim of a motor accident if eight conditions under s. 96 of the RTA have been fulfilled. The eight conditions were: (i) the insurer must be an authorised insurer within the meaning of s. 89 read with s. 91(1)(a) of the RTA; (ii) the insurer must insure the insured in respect of any liability which may be incurred by the insured in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle and the policy does not cover any of the matters stated in proviso (aa) to (cc) of s. 91 of the RTA ('second condition'); (iii) a certificate of insurance in the prescribed form and which contains prescribed particulars has been delivered by the insurer to the insured ('third condition'); (iv) the insured has caused death or bodily injury to the victim by or arising out of the use of a motor vehicle or implement drawn thereby on a road; (v) the victim has filed a suit against the insured in respect of liability covered by the policy; (vi) the circumstances provided in s. 96(2)(a) to (c) of the RTA were not present; (vii) the victim has obtained a judgment against the insured in the liability suit. If a victim has obtained a judgment in the liability suit against the insured, the victim need not file a suit against the insurer ('sixth condition'); and (viii) the insurer had not obtained a declaration from the court that the insurance is void or unenforceable. (para 13)

(2) There was no evidence that the defendant had issued an insurance policy to the first plaintiff in respect of the car within the meaning of ss. 91(1)(a), (b) and 96(1) of the RTA. Accordingly, the second condition for the defendant's liability under s. 96(1) of the RTA, as explained in *Pacific Insurance*, had not been satisfied. On this ground alone, this action should have been struck out. Additionally, the first plaintiff did not pay

any insurance 'premium' to the defendant regarding the car. An insurance policy is a contract which must be supported by consideration in the form of payment of premium by an insured to an insurer. No consideration, as understood in s. 2(d) of the CA, had been provided for an insurance policy to be issued by the defendant to the first plaintiff for the car. There was also no evidence that the plaintiffs had proven the third condition and this was the second ground to strike the action. (paras 14-16 & 18)

(3) By reason of s. 96(2)(a) of the RTA, it was incumbent on the first plaintiff to give notice of the Klang suit to the defendant before the commencement of the Klang suit or within seven days after the commencement of the Klang suit. In this case, the first plaintiff had not only breached s. 96(2)(a) of the RTA by not giving notice of the Klang suit to the defendant but the first plaintiff had also entered into the consent judgment without any notice to the defendant. There was thus a clear breach of the sixth condition which negated any liability on the defendant's part under s. 96(1) of the RTA. This constituted a third ground for this court to strike out the action (para 20)

(4) Thulasimani could not assign the defendant's policy for her to any party, including the first plaintiff. The first plaintiff could only claim the benefit of the defendant's policy for Thulasimani if the defendant, Thulasimani and the first plaintiff agreed to novate the defendant's policy for Thulasimani within the meaning of s. 63 of the CA. As there was no tri-partite novation to the defendant's policy (Thulasimani), amongst the defendant, Thulasimani and the first plaintiff within the meaning of s. 63 of the CA, this action was obviously unsustainable against the defendant. (paras 22 & 25)

(5) It was plain and obvious that this action (i) was frivolous and/or vexatious within the meaning of O. 18 r. 19(1)(b) of the Rules of Court 2012 ('ROC'); and/or (ii) constituted an abuse of court process which should be struck out under O. 18 r. 19(1)(d), O. 92 r. 4 of the ROC, the court's inherent jurisdiction and/or inherent power. (para 29)

Case(s) referred to:

AmGeneral Insurance Bhd v. Fazlina Mihad & Ors [2018] 2 CLJ 318 HC ***(refd)***

Muraly Varataa Raju v. Allianz General Insurance Company (M) Bhd [2019] 1 LNS 2097 HC ***(refd)***

Pacific Insurance Bhd v. Tharmaseelan Mulri Trans Service & Ors [2019] MLRHU 596 ***(refd)***

Peters v. General Accident Fire and Life Assurance Corporation Ltd [1937] 4 All ER 628 ***(refd)***

Roslan Abdullah v. New Zealand Insurance Co Ltd [1981] 1 LNS 40 FC ***(refd)***

Swain v. The Law Society [1983] AC 498 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 5(1)
Contracts Act 1950, ss. 2(d), 63
Road Transport Act 1987, ss. 91(1)(a), (b), (4), 96(1), (2)(a), 117
Rules of Court 2012, O. 18 r. 19(1)(b), (d), O. 92 r. 4

For the appellant - Harikannan Ragaran; M/s Jayadeep Hari & Jamil
For the respondents - Nor Suhaida Ibrahim; M/s Naicker & Assocs

Reported by Najib Tamby

JUDGMENT

Wong Kian Kheong J:

Background

[1] I will refer to parties as they are in the Magistrate's Court (MC).

[2] The first plaintiff (first plaintiff) is the owner of a car with the registration no. WRB 1110 (car).

[3] Encik Nafizal bin Ahmad (Encik Nafizal) had filed Klang MC Suit No. A73KJ-915-10-2016 against the first plaintiff (Klang suit). In the Klang suit, Encik Nafizal alleged as follows, among others:

(i) on 12 February 2016, there was an accident on the road from Kuala Selangor to Klang which involved a motorcycle ridden by Encik Nafizal and the car driven by the first plaintiff (accident); and

(ii) the first plaintiff's negligence had caused the accident which resulted in personal injuries to Encik Nafizal and damage to his motorcycle.

[4] On 4 October 2017, Encik Nafizal and the first plaintiff entered into a consent judgment in the Klang suit (consent judgment). According to the consent judgment, among others:

(i) without any admission as to liability, the first plaintiff shall pay to Encik Nafizal a total sum of RM55,000 which consists of general damages, special damages, interest and costs (judgment sum); and

(ii) the consent judgment is recorded without any prejudice to the right of the first plaintiff's insurer of the car, the above-named second plaintiff (second plaintiff), to claim an indemnity from the defendant (defendant) as a "co-insurer" of the car.

[5] The first and second plaintiffs (collectively referred to in this judgment as the "plaintiffs") have filed this suit in the MC against the defendant (this action). In this action, the plaintiffs have alleged as follows, among others:

(i) the second plaintiff is an insurer of the first plaintiff's car who has paid the judgment sum to Encik Nafizal. Accordingly, the first plaintiff's

rights under the insurance policy with the second plaintiff have been subrogated to the second plaintiff (subrogation);

(ii) the defendant is a co-insurer of the car against whom the second plaintiff can claim an indemnity for half of the judgment sum, namely an amount of RM27,500 (sum). The plaintiffs conducted a search of the records of "Jabatan Pengangkutan Jalan" (JPJ) regarding the car and JPJ's "Maklumat Insurans Kenderaan" stated that the defendant was an insurer of the car from 3 March 2015 to 2 March 2016 (JPJ's record (car insurance)). As such, the plaintiffs claim in this action for the defendant to pay the sum to the second plaintiff (due to the subrogation).

[6] The defendant applied to the MC to strike out this action (defendant's application) on the following grounds:

(i) the defendant had insured the car for the benefit of one Ms Thulasimani a/p Suppayah (Ms Thulasimani) for a period of time from 3 March 2015 until 2 March 2016 (defendant's policy (Ms Thulasimani)); and

(ii) Ms Thulasimani had sold the car in June 2015 (before the accident). Hence, the defendant was not a co-insurer of the car at the time of the accident.

[7] The learned Magistrate dismissed the defendant's application with costs in the cause (MC's decision). As such, the defendant appeals to this court against MC's decision (this appeal).

Issues

[8] The following questions arise in this appeal:

(i) what weight should be attached to JPJ's record (car insurance) under s. 117 of the Road Transport Act 1987 (RTA)?; and

(ii) whether the defendant is liable as an co-insurer of the car to the plaintiffs under ss. 91(1), (4) and 96(1) RTA when:

(a) there is no insurance policy issued by the defendant to the first plaintiff regarding the car within the meaning of ss. 91(1)(a), (b) and 96(1) RTA;

(b) a certificate of insurance in the prescribed form has not been delivered by the defendant to the first plaintiff as required by s. 91(4) read with s. 96(1) RTA;

(c) contrary to s. 96(2)(a) RTA, the first plaintiff did not give notice of the Klang suit to the defendant before or within seven days after the commencement of the Klang suit;

(d) there is no novation of the defendant's policy (Ms Thulasimani) under s. 63 of the Contracts Act 1950 (CA) wherein the defendant has agreed to indemnify the first plaintiff regarding the car; and

A (e) as there is no novation of the defendant's policy (Ms Thulasimani) for the defendant to indemnify the first plaintiff concerning the car, the defendant's policy (Ms Thulasimani) has lapsed upon Ms Thulasimani's sale of the car.

What Is Effect Of JPJ's Record (Car Insurance)?

B

[9] I reproduce below s. 117 RTA:

Provisions as to evidence.

117(1) *A registration certificate shall be prima facie evidence of the registration of the motor vehicle referred to therein, and of the particulars appearing in the register* C *relating to such motor vehicle and the registered owner thereof.*

(2) *A copy of any entry in any register required to be kept under this Act, purporting to be signed by or on behalf of the person who, under this Act, is required to keep such register, and certified by or on behalf of such person to be a true copy thereof, shall be evidence of the matters stated in that entry without proof of the signature* D *or authority of the person signing the said entry or the said certificate.*

(3) When in any proceedings for an offence against this Act it is necessary to prove:

(a) that a motor vehicle was, or was not, registered in the name of any person;

E

(b) that any person was, or was not, the registered owner of a motor vehicle; or

(c) that any person was, or was not, the holder of a licence granted under Part II,

F a certificate purporting to be signed by a Director, Deputy Director or licensed registrar and certifying the matters aforesaid shall be admissible as evidence, and shall constitute *prima facie* proof of the facts certified in such certificate, without proof of the signature of the Director, Deputy Director or licensed registrar to such certificate.

G (4) When in any proceedings for an offence against this Act it is necessary to prove:

(a) that a motor vehicle was, or was not, an authorised vehicle; or

(b) that any person is a road transport officer,

H a certificate purporting to be signed by the Director General, and certifying as to the matters aforesaid, shall be admissible as evidence, and shall constitute *prima facie* proof of the facts certified in such certificate, without proof of the signature of the Director General to such certificate.

(5) When in any proceedings for an offence against this Act, any question arises as to the damage or extent of damage caused to a motor vehicle I as a result of an accident or whether a motor vehicle does, or does not, comply with any provision of this Act relating to the construction, equipment or conditions of use of such motor vehicle, the certificate of a road transport officer or any person licensed under this Act that he has

examined the motor vehicle and the result of such examination shall be admissible in evidence, and shall be sufficient *prima facie* evidence of any fact or opinion stated therein relating to the construction, equipment or conditions of use of such motor vehicle, and the officer or the person licensed under this Act may not be called for cross-examination on the certificate unless contrary evidence is given which appears to the court to be credible, or unless for any reason the court considers cross-examination to be necessary or desirable in the interest of justice:

Provided that in any case in which the prosecution intends to give in evidence of any such certificate there shall be delivered to the defendant a copy thereof not less than ten clear days before the commencement of the trial.

(6) When in any proceedings it is necessary to prove the weight unladen or laden of any vehicle, or the weight of any load carried on any vehicle, or the weight carried on any axle of the vehicle, a certificate purporting to be signed by:

(a) any police officer authorised in writing in that behalf by a Chief Police Officer or Commissioner of Police;

(b) any road transport officer authorised in writing in that behalf by the Director General;

(c) any officer of the Public Works Department authorised in writing in that behalf by the Director General of Public Works or the State Director of Public Works, or any officer of the Highway Authority Malaysia authorised in writing in that behalf by the Director General of Highway Authority Malaysia;

(d) any traffic warden authorised in writing in that behalf by the Dato Bandar or the Perbadanan Putrajaya;

(e) any officer of a port authority authorised in writing in that behalf by the General Manager of the port authority;

(f) any person licensed under this Act,

to operate the weigh-bridge or weighing machine on which the said vehicle or load was weighed, and certifying:

(aa) that such weigh-bridge or weighing machine had been examined within the previous six months and found to be accurate by the Inspector of Weights and Measures; and

(bb) the weight of such vehicle or load,

shall be accepted by any court as *prima facie* proof of the facts certified in such certificate.

(7) When in any proceedings before any court it is necessary to prove that any police officer, the Director General, any Director, any road transport officer, any public servant, any person licensed under this Act or any traffic warden has sent or served, or has received or has not received, any badge, document, licence, notice, plate or other thing, a certificate purporting to

A be signed by or on behalf of such police officer, Director General, Director, road transport officer, public servant, any person licensed under this Act or traffic warden and certifying the sending, service, reception or non-reception of such badge, document, licence, notice, plate or thing, shall be admissible as evidence, and shall constitute *prima facie* proof of the facts certified in such certificate, without proof of the signature to such B certificate.

(8) In any proceedings in any court, particulars of a conviction endorsed on a driving licence granted under Part II may be produced as *prima facie* evidence of the conviction.

C (9) Where in any proceedings for an offence against this Act it is necessary to prove that a helmet is or is not a protective helmet, or a seat-belt is or is not a safety seat-belt, prescribed under the rules made under this Act, a certificate purporting to be signed by the Director or any officer of the Standards and Industrial Research Institute of Malaysia shall be admissible as evidence, and shall constitute *prima facie* proof of any fact D or opinion stated therein, without proof of the signature of the said Director or officer to such certificate, and neither the Director nor any officer of the Standards and Industrial Research Institute of Malaysia shall be called for cross-examination on the certificate unless for any reason the court considers the cross-examination to be necessary or desirable in the interest of justice.

E (10) When in any proceedings it is necessary to prove the speed of any vehicle, a certificate purporting to be signed by any public servant who is an electrical engineer or a mechanical engineer and certifying that any equipment used for determining the speed of vehicles had been examined within the previous eight months and found to be accurate shall be F accepted by any court as *prima facie* proof of the facts certified in such certificate and such public servant shall not be called for cross-examination on the certificate unless for any reason the court considers the cross-examination to be necessary or desirable in the interest of justice.

(11) In any proceedings in any court, any recorded image tendered by the prosecution for any offence under this Act shall be admissible as evidence, G and shall constitute *prima facie* proof of any fact stated therein.

(emphasis added)

[10] It is decided in *Muraly Varataa Raju v. Allianz General Insurance Company (M) Bh*d [2019] 1 LNS 2097; [2020] 3 AMR 374, at [12] to [17], H as follows:

[12] *Firstly, sub-sections (3) to (5) and (9) of s. 117 RTA concern proceedings for offences under RTA and do not apply to JPJ's Record (car Insurance).*

[13] S*econdly s. 117(6) to (8), (10) and (11) RTA do not concern JPJ's Record (car Insurance).*

I

[14] *Thirdly, JPJ's Record (car Insurance) is not a "registration certificate" within the meaning of ss 10(1), 11(1)(c) and 117(1) RTA. Sections 10(1) and 11(1)(c) RTA state as follows:*

Applications for registration

10(1) *Every application for the registration of a motor vehicle shall be made in the prescribed form to the Director of a registration area and shall be signed by the person for the time being entitled to the possession of the motor vehicle.*

...

11(1) *Upon the registration of a motor vehicle, the Director shall:*

...

(c) *issue to that person a registration certificate in the prescribed form.*

(emphasis added)

[15] *Fourthly, s. 117(2) RTA does not apply to JPJ's record (car insurance) because:*

(1) *JPJ's Record (car Insurance) is not a copy of any entry in any register required to be kept under RTA (JPJ's Register) which had been signed by or on behalf of the person who, under RTA, is required to keep JPJ's Register (JPJ Officer); and*

(2) *JPJ's Record (car Insurance) has not been certified by JPJ Officer to be a true copy of an entry in JPJ's Register.*

[16] *Fifthly, there is nothing in RTA which provides for the conclusiveness of any record of JPJ. This is unlike s. 89 of the National Land Code (NLC) which provides for the conclusiveness of the "Register Document of Title" regarding, among others, titles to land and interest in land. Section 89 NLC provides as follows:*

Conclusiveness of register documents of title

89. *Every register document of title duly registered under this Chapter shall, subject to the provisions of this Act, be conclusive evidence:*

(a) *that title to the land described therein is vested in the person or body for the time being named therein as proprietor; and*

(b) *of the conditions, restrictions in interest and other provisions subject to which the land is for the time being held by that person or body, so far as the same are required by any provision of this Act to be specified to referred to in that document.*

(emphasis added)

[17] *Premised on the above reasons, the plaintiff cannot rely on s. 117 RTA to persuade this court to attach any evidential value to JPJ's Record (car Insurance).*

(emphasis added)

[11] As explained in *Muraly*, the plaintiffs cannot rely on JPJ's record (car insurance) to sustain this action against the defendant.

Eight Conditions For Insurer's Liability To Arise Under Section 96 RTA

[12] Sections 91(1), (4), 96(1) and (2) RTA read as follows:

Requirements in respect of policies

91(1) *In order to comply with the requirements of this Part, a policy of insurance must be a policy which*:

(a) *is issued by a person who is an authorised insurer within the meaning of this Part; and*

(b) *insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle* or land implement drawn thereby *on a road*:

Provided that such policy shall not be required to cover:

(aa) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

(bb) except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise; or

(cc) any contractual liability.

…

(4) *A policy shall be of no effect for the purposes of this Part unless and until there is delivered by the insurer to the person by whom the policy is effected a certificate (in this Act referred to as a "certificate of insurance") in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed*, and different forms and different particulars may be prescribed in relation to different cases or circumstances.

Duty of insurers to satisfy judgments against persons insured in respect of third party risks

96(1) *If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.*

(2) *No sum shall be payable by an insurer under subsection (1)*: A

(a) *in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the proceedings*;

(b) in respect of any judgment, so long as execution is stayed pending an appeal; or B

(c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability the policy was cancelled by mutual consent or by virtue of any provision contained therein and either: C

(i) before the happening of the said event the certificate was surrendered to the insurer or the person to whom the certificate was delivered made a statutory declaration stating that the certificate had been lost or destroyed;

(ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer or the person to whom the certificate was delivered made such a statutory declaration as aforesaid; or D

(iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Part in respect of the failure to surrender the certificate. ... E

(emphasis added)

[13] An insurer is only liable for a judgment obtained by a victim of a motor accident if eight conditions under s. 96 RTA (eight conditions) have been fulfilled. The eight conditions have been explained in *Pacific Insurance Bhd v. Tharmaseelan Mulri Trans Service & Ors* [2019] MLRHU 596, at [6], as follows: F

[6] *I am of the view that an insurer is bound under s. 96(1) RTA to pay a person who has died or who has suffered bodily injury in a motor accident (Victim) if all of the following eight conditions are fulfilled*: G

(1) the insurer "must" be an "authorised insurer" within the meaning of s 89 read with s. 91(1)(a) RTA (*1st Condition*);

(2) *the insurer "must" insure the insured "in respect of any liability which may be incurred by [the insured] in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle" and the policy does not cover any of the matters stated in proviso (aa) to (cc) of s. 91(1) RTA - please see ss 91(1)(b) and 96(1) RTA (2nd Condition)*; H

(3) *a certificate of insurance in the prescribed form and which contains prescribed particulars has been delivered by the insurer to the insured - please see ss. 91(4) and 96(1) RTA (3rd Condition)*; I

(4) the insured has caused death or bodily injury to the Victim by or arising out of the use of a motor vehicle or implement drawn thereby on a road - please see ss. 91(1)(b) and 96(1) RTA (*4th Condition*);

(5) the Victim has filed a suit against the insured in respect of liability covered by the policy (*Liability Suit*) - please see s 96(1) RTA (*5th Condition*);

(6) *the circumstances provided in s. 96(2)(a) to (c) RTA are not present (6th Condition)*;

(7) the Victim has obtained a judgment against the insured in the Liability Suit - please see s. 96(1) RTA *(7th Condition)*. In *Ramli bin Samad v. Pacific & Orient Insurance Co Sdn Bhd* [2010] 3 MLJ 23, at [61] and [62], Abdul Malik Ishak JCA decided as follows in the Court of Appeal:

> [61] Finally, an insurance company like Pacific & Orient Insurance Co Sdn Bhd only indemnifies the insured like the second defendant employer when there is a judgment against the insured. Here, since no judgment was obtained against the second defendant employer as the insured, there is nothing for the insurer to indemnify. The duty of an insurer to satisfy judgment is set out in s. 96(1) [RTA] … …
>
> [62] Thus, any action against Pacific & Orient Insurance Co Sdn Bhd - the respondent herein, must be dismissed forthwith.
>
> (emphasis added)

If a Victim has obtained a judgment in the Liability Suit against the insured, the Victim need not file a suit against the insurer (*Recovery Suit*) and obtain judgment against the insurer in the Recovery Suit - please see the judgment of Ramly Ali JCA (as he then was) in the Court of Appeal in *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947, at [21]; *and*

(8) the insurer has not obtained a declaration from the court that the insurance is void or unenforceable - please see s. 96(3) RTA (*8th Condition*).

(emphasis added)

Did Defendant Issue Insurance Policy Regarding Car To First Plaintiff?

[14] Firstly, there is no evidence that the defendant had issued an insurance policy to the first plaintiff in respect of the car within the meaning of ss. 91(1)(a), (b) and 96(1) RTA. Accordingly, the second condition for the defendant's liability under s. 96(1) RTA as explained in *Pacific Insurance* has not been satisfied in this case. On this ground alone, this action should have been struck out.

[15] Secondly, the first plaintiff did not pay any insurance "premium" to the defendant regarding the car. An insurance policy is a contract which must be supported by consideration in the form of payment of premium by an insured to an insurer. I refer to the following judgment of Lord Diplock in the House of Lords in *Swain v. The Law Society* [1983] AC 498, at 611, as follows:

> "*Premium" in the context of insurance law is a term of art. It means a sum of money paid by an assured to an insurer in consideration of his indemnifying the assured for loss sustained in consequence of the risk insured against*.
>
> (emphasis added)

[16] Thirdly, the requirement of consideration for a valid contract is provided in s. 2(d) CA which states as follows:

> Interpretation
>
> s. 2 In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:
>
> ...
>
> (d) *when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstains from doing, something, such act or abstinence or promise is called a consideration for the promise*;
>
> (emphasis added)

No consideration as understood in s. 2(d) CA has been provided for an insurance policy to be issued by the defendant to the first plaintiff for the car. This is because the first plaintiff or any other person:

(i) has not done something;

(ii) has not abstained from doing something;

(iii) is not doing something;

(iv) is not abstaining from doing something;

(v) has not promised to do something; or

(vi) has not promised to abstain from doing something

"at the desire" of the defendant. It is therefore clear that there is no valid consideration pursuant to s. 2(d) CA which can support the existence of a lawful insurance contract between the defendant and first plaintiff in respect of the car.

A **Whether Certificate Of Insurance Regarding Car Had Been Delivered By Defendant To First Plaintiff**

[17] As stated in *Pacific Insurance*, the plaintiffs have to prove the third condition as required by ss. 91(4) and 96(1) RTA, namely a certificate of insurance in respect of the car in the prescribed form and which contains
B prescribed particulars has been delivered by the defendant to the first plaintiff.

[18] There is no evidence that the plaintiffs have proven the third condition. This is the second ground to strike out this action.

C **Was There Compliance With Section 96(2)(a) RTA?**

[19] The purpose of s. 96(2)(a) RTA is clear - if an insurer is informed of any suit against an insured, the insurer may exercise its rights under the insurance policy to take over the conduct of the defence in the suit from the insured. In such an event, the insurer has a discretion to defend or
D compromise the suit as the insurer thinks fit.

[20] By reason of s. 96(2)(a) RTA, it is incumbent on the first plaintiff to give notice of the Klang suit to the defendant:

(i) before the commencement of the Klang suit; or

E (ii) within seven days after the commencement of the Klang suit.

In this case, the first plaintiff had not only breached s. 96(2)(a) RTA by not giving notice of the Klang suit to the defendant but the first plaintiff had also entered into the consent judgment without any notice to the defendant. There
F is thus a clear breach of the sixth condition (as explained in *Pacific Insurance*) which negatives any liability on the defendant's part under s. 96(1) RTA. This constitutes a third ground for this court to strike out this action.

Whether Defendant Has Novated Defendant's Policy (Ms Thulasimani) under Section 63 CA

G **[21]** Section 63 CA provides as follows:

> *Effect of novation*, rescission and alteration *of contract*
>
> 63. *If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.*
>
> H *ILLUSTRATIONS*
>
> (a) *A owes money to B under a contract. It is agreed between A, B and C that B shall henceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.*
>
> I (b) *A owes B RM10,000. A enters into an arrangement with B, and gives B a mortgage of his (A's) estate for RM5,000 in place of the debt of RM10,000. This is a new contract and extinguishes the old.*

(c) *A owes B RM1,000 under a contract. B owes C RM1,000. B orders A to credit C with RM1,000 in his books, but C does not assent to the agreement. B still owes C RM 1,000, and no new contract has been entered into.*

(emphasis added)

[22] Firstly, Ms Thulasimani cannot assign the defendant's policy (Ms Thulasimani) to any party (including the first plaintiff). Secondly, the first plaintiff can only claim the benefit of the defendant's policy (Ms Thulasimani) if the defendant, Ms Thulasimani and first plaintiff had agreed to novate the defendant's policy (Ms Thulasimani) within the meaning of s. 63 CA. For these two propositions, I refer to the following judgment of Goddard J (as he then was) in the English High Court case of *Peters v. General Accident Fire and Life Assurance Corporation Ltd* [1937] 4 All ER 628, at 630, 631, 633 and 634:

This is an action brought by Mr John Peters under the provisions of the Road Traffic Act 1934, s. 10. *He alleges that, he being a person who had recovered judgment against one Christopher Pope for the sum of £387 7s 8d in respect of personal injuries suffered by him (he being injured by a motor car driven by Pope), and also £117 costs, he has a right to recover his damages against the General Accident Fire and Life Assurance Corporation. He contends that he is entitled to the benefit of a policy which had been issued by the company in respect of the motor van which knocked him down, the van at the time being driven and owned by Christopher Pope. The case raises a question which is, if the law is as I think it is, of vast importance to insurance companies, because the law must be the same, whatever are the particular circumstances with regard to the case. If it be the fact that a company can be made liable when a car has been driven in the circumstances in which this car was being driven - that is to say, after a sale to a person of whom they had never heard …*

… The facts of this case are these. The car in question is an Austin seven van, and it was the property of a Mr Coomber. Mr Coomber was insured under a policy which is admitted to have been in force on the day of the accident, which was 8 September 1935. The premium had been paid up to 30 September 1935. In July 1935 - that is to say, two months before the accident took place - Mr Coomber sold his car to a Mr Pope, the person who was involved in the accident. The terms upon which Mr Coomber sold his car were that he sold it to this man for £10, £5 down and £5 to be paid at Mr Pope's convenience. On receiving the £5, Mr Coomber handed over this valuable car to Mr Pope, who thereupon took it away, and afterwards drove it and used it as his own. He paid the £5 balance after the accident had taken place. Now Mr Comyns carr asks me to hold that Mr Coomber still retained an interest in the car. The only interest that he retained, as far as I can see, was an interest to be paid £5. It was not an interest in the car. He may have had, as an unpaid vendor, an insurable interest for some purposes; I do not know, but he parted with the car. The property in the car passed on the sale, and a clearer instance of property passing at the time of sale of specific goods I confess I cannot well imagine. The car thereupon became Pope's property. Now, what became of the policy? What became of the piece of paper on which the policy was written? The policy was handed over by Mr Coomber to Mr Pope, and together with it was handed over an application form for a new policy, and the registration book. It looks to me very much as though

Mr Coomber was handing over the policy to Mr Pope and saying: "Here, you have got to get a new policy made out." Mr Coomber was making himself a party apparently, and, I should think, consciously making himself a party, to Mr Pope driving his car away from the premises uninsured. I have no doubt that they thought they could safely take that risk, and, indeed, they were right, because no accident occurred on that occasion, but there is a great deal of force in what Mr Samuels says, that that shows that there was no intention on Mr Coomber's part to assign his property, if he could assign it, to Mr Pope. I think that is quite right, but, as a matter of fact, whether he had the intention or not, I do not think, for the reasons I shall give in a moment, that he could assign it. However, he drove the car away, and then this accident happened thereafter.

As to the question of what happened to the policy, I think the policy lapsed. I think that there was thereafter no policy in existence upon this car, because the only person who was insured was Mr Coomber, and Mr Coomber had parted with the car. …

Can it be said here, by any stretch of imagination, that Mr Pope was driving by the order or with the permission of Mr Coomber? It seems to me that it is quite impossible to say that. He bought the car, it was his own car, and he was driving his own car, not by Mr Coomber's permission, and certainly not under his order. *He was driving it because it was his own car, and I think that, following Rogerson's case and Tattersall v Drysdale, I am bound to hold that, when Mr Coomber parted with his car, his insurance qua that car lapsed, and that there was no insurance. Therefore I decide, first of all, that there was no insurance at all in force on the car at this time. It is quite impossible to say that a person who is driving his own car, which he has bought and the property in which is in him, is driving it by the permission or on the order of the person who sells the car.*

The last point that was taken by Mr Comyns Carr was that there was an assignment of the policy. I have already said why I do not think that there was an assignment in fact. I do not think that you can assign a policy of this nature at all. You can assign your right to receive money under it. If an accident has occurred, and you have a right to be indemnified by your insurers, or if your car has been destroyed, so that you have a right to be paid by your insurers, you can assign your right to anybody you choose, subject to the Road Traffic Act. In view of the statutory provisions, I do not think that you can assign away your right so as to prevent the injured person from recovering the money. At any rate, the insurance company would not pay it, because otherwise they might be liable to pay twice over. In all contracts of insurance - I am not dealing with marine insurance, because different considerations apply in marine insurance, nor am I dealing with life insurance, which is not really insurance in the proper sense of the term at all; *I am dealing with burglary, fire, accident, and so forth - I do not think you can assign the policy so as to make of what is a contract of personal indemnity to A a contract of personal indemnity to B. I hope I have made that clear. You cannot thrust a new assured upon a company against its will. If you do that, you must have a novation. You must have the release of the assured and the acceptance of a new assured. It is not a question of assigning a chose in action, such as a debt, a right to recover money. …*

> *… I have no doubt, therefore, that you cannot assign a motor policy in the way that it is suggested it was done here. If you sell your car, you cannot, merely by handing over your car and saying: "Take this policy and do what you can with it; I assign it to you," put the underwriters under an obligation to indemnify the purchaser, when they have agreed only to indemnify the vendor. Consequently, on all grounds here the action, in my opinion, fails.*
>
> (emphasis added).

The above judgment of Goddard J in *Peters* has been affirmed by Wilfred Greene MR in the Court of Appeal - please refer to [1938] 2 All ER 267, at 269-270.

[23] Firstly, I apply the English case of *Peters* by reason of s 5(1) of the Civil Law Act 1956 (CLA). Section 5(1) CLA provides as follows:

> Application of English law in commercial matters
>
> s. 5(1) *In all questions or issues which arise or which have to be decided in the States of Peninsular Malaysia other than Malacca and Penang* with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and *with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law*.
>
> (emphasis added)

[24] Secondly, *Peters* has been applied by our courts as follows:

(i) the judgment of Wan Suleiman FJ in the Federal Court in *Roslan Abdullah v. New Zealand Insurance Co Ltd* [1981] 1 LNS 40; [1981] 2 MLJ 324, at 325; and

(ii) Faizah Jamaludin JC's (as she then was) decision in the High Court case of *AmGeneral Insurance Bhd v. Fazlina Mihad & Ors* [2018] 2 CLJ 318, at [30].

[25] As there is no tri-partite novation of the defendant's policy (Ms Thulasimani) among the defendant, Ms Thulasimani and first plaintiff within the meaning of s. 63 CA, this action is obviously unsustainable against the defendant.

Whether Defendant's Policy (Ms Thulasimani) Had Lapsed Upon Sale Of Car By Ms Thulasimani

[26] The following cases have held that upon the sale of the car, the defendant's policy (Ms Thulasimani) has lapsed:

(i) *Peters*;

(ii) *Roslan Bin Abdullah*; and

(iii) *AmGeneral Insurance*.

[27] There is nothing in principle and policy which persuades me to depart from the cases stated in the above para. 26. Hence, upon the sale of the car by Ms Thulasimani, the defendant's policy (Ms Thulasimani) has lapsed. This is the last ground for striking out this action.

Cases Relied On By Plaintiffs

[28] I have perused all the cases cited by the plaintiffs' learned counsel. All these cases can be easily distinguished from this action on any one or more of the following five grounds:

(i) the first plaintiff did not pay any premium to the defendant for an insurance policy regarding the car. Nor did the first plaintiff provide any consideration within the meaning of s. 2(d) CA to the defendant for an insurance policy in respect of the car. Hence, the defendant did not issue any insurance policy for the car to the first plaintiff as understood in ss. 91(1)(a), (b) and 96(1) RTA;

(ii) no certificate of insurance concerning the car in the prescribed form has been delivered by the defendant to the first plaintiff as required by s. 91(4) read with s. 96(1) RTA;

(iii) the first plaintiff has breached s. 96(2)(a) RTA by not giving notice of the Klang suit to the defendant before or within seven days after the commencement of the Klang suit;

(iv) the defendant has not agreed by way of novation of the defendant's policy (Ms Thulasimani) under s. 63 CA to indemnify the first plaintiff regarding the car; and/or

(v) the defendant's policy (Ms Thulasimani) has lapsed upon Ms Thulasimani's sale of the car.

Court's Decision

[29] Premised on the above reasons, it is plain and obvious that this action:

(i) is frivolous and/or vexatious within the meaning of O. 18 r. 19(1)(b) of the Rules of Court 2012 (RC); and/or

(a) constitutes an abuse of court process which should be struck out under O. 18 r. 19(1)(d), O. 92 r. 4 RC, the court's inherent jurisdiction and/or inherent power.

[30] The upshot is this appeal is allowed with costs.